Daihatsu (M) Sdn Bhd v Seni Jaya Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2(S1)–22–276 OF 1995
KAMALANATHAN RATNAM J
11 APRIL 2001

Contract *— Terms — Implied terms — Agreement to advertise dependant on main agreement to grant exclusive advertising rights — Duty of court to imply terms if circumstances so warrant it — Intention of parties — Whether terms should be implied*

The defendant agreed to grant, and the plaintiff agreed to take exclusive right of, displaying a neon billboard bearing the words 'Daihatsu' on the rooftop of a hotel. The agreement was for a period of three years commencing 1 March 1989 and terminating on 28 February 1992. It was agreed that the plaintiff would have the option of renewing the agreement three months before the expiry date, subject to certain terms and conditions. The defendant agreed to undertake the lighting up of the billboard and any remedial measures necessary to ensure the illumination of the said billboard. Months before the expiry date, the plaintiff gave notice to the defendant that it wished to have the agreement renewed. The defendant, in turn, informed the plaintiff that it would not be able to renew the agreement because the owners and operators of the said hotel had given the defendants three months' notice terminating the defendant's right to display the advertisement. The plaintiff thus claimed for specific performance of the contract and damages. The issues were: (i) whether the plaintiff's notice having been given three months too early was premature; (ii) whether the court ought to imply a term that the present agreement would be of no significance without the existence of the main agreement between the defendant and the hotel; and (iii) whether the defendant had waived its rights to raise the issue of premature notice by only raising it in the defence.

Held, dismissing the claim with costs:

(1) The issue of the notice being premature was only raised by the defendant in its defence and it had made no other protests. This conduct indicated that the defendant had accepted the notice as a valid notice and was therefore estopped from contending otherwise (see p 190E).

(2) This was a typical case where the court ought to consider the question of an implied term as was done by the court in *Yong Ong Kai v Enting* [1965] 2 MLJ 98. Whilst it was agreed that the courts ought not lightly imply a term into a contract, it is also the duty of the court to ensure justice is meted out and in order to do so, and if the circumstances thus warrant that a term be implied into the contract, the court must do so. It must have been at the back of the minds of the parties that their present agreement would be of

no significance without the existence of the main agreement between the defendant and the hotel. The court would therefore imply this as a term of the agreement (see p 191G–I).

(3) The conduct of the plaintiff in tendering the notice three months earlier was to put pressure upon the defendant. This was clearly unconscionable. The court therefore ruled that the notice was indeed premature. Also the defendant did not waive its right to raise this argument by merely keeping quiet and raising it in its defence. There was no legal duty on the part of the defendant to have responded. In fact, there was nothing to have prevented the defendant from even applying to amend to include this plea of prematurity of the notice, even if it had omitted to do so in its defence (see p 192E–F).

[Bahasa Malaysia summary

Defendan telah bersetuju untuk membenarkan, dan plaintif telah bersetuju untuk mengambil hak eksklusif, pameran satu papan tanda neon yang mempamerkan perkataan-perkataan 'Daihatsu' di atas bumbung sebuah hotel. Perjanjian tersebut adalah untuk tempoh tiga tahun bermula pada 1 Mac 1989 dan tamat pada 28 Februari 1992. Adalah dipersetujui bahawa plaintif mempunyai pilihan untuk memperbaharui perjanjian tersebut tiga bulan sebelum tarikh luput, tertakluk kepada terma-terma dan syarat-syarat tertentu. Defendan bersetuju untuk menguruskan pemasangan lampu papan tanda tersebut dan apa-apa langkah-langkah pemulihan yang perlu untuk memastikan penghiasan papan tanda tersebut. Beberapa bulan sebelum tarikh luput, plaintif telah memberikan notis kepada defendan yang ia berhasrat untuk memperbaharui perjanjian tersebut. Defendan, sebaliknya, memaklumkan plaintif bahawa ia tidak boleh memperbaharui perjanjian tersebut kerana pemilik-pemiik dan pengurus-pengurus hotel tersebut telah memberikan defendan tiga bulan notis menamatkan hak defendan untuk mempamerkan iklan tersebut. Plaintif oleh itu telah menuntut pelaksanaan spesifik terhadap kontrak tersebut dan ganti rugi. Persoalan-persoalannya adalah: (i) sama ada notis plaintif yang telah diberikan tiga bulan lebih awal adalah pra masa; (ii) sama ada mahkamah sepatutnya menyiratkan satu terma bahawa perjanjian sekarang ini tidak mempunyai apa-apa kesan tanpa kewujudan perjanjian utama antara defendan dan hotel tersebut; dan (iii) sama ada defendan telah mengetepikan haknya untuk menimbulkan persoalan notis pra masa dengan hanya menimbulkannya dalam pembelaan.

Diputuskan, menolak tuntutan tersebut dengan kos:

(1) Persoalan notis tersebut adalah pra masa hanya dibangkitkan oleh defendan dalam pembelaan beliau dan ia tidak membuat apa-apa bantahan lain. Perbuatan ini menandakan bahawa defendan

menerima notis tersebut sebagai satu notis sah dan oleh itu diestopkan daripada menegaskan sebaliknya (lihat ms 190E).

(2) Ini adalah kes yang biasa di mana mahkamah sepatutnya mempertimbangkan persoalan satu terma tersirat sebagaimana yang telah dilakukan oleh mahkamah di dalam *Yong Ong Kai v Enting* [1965] 2 MLJ 98. Meskipun telah dipersetujui bahawa mahkamah-mahkamah sepatutnya tidak mengambil ringan menyiratkan satu terma ke dalam satu kontrak, ia juga adalah kewajipan mahkamah untuk memastikan keadilan dilaksanakan dan bagi tujuan berbuat demikian, dan jika keadaan dengan itu mewarankan agar satu terma tersirat dalam kontrak, mahkamah mestilah berbuat demikian. Ia pastinya di benak fikiran kedua-dua pihak yang perjanjian mereka ini tidak akan mempunyai kesan tanpa kewujudan perjanjian utama antara defendan dan hotel tersebut. Mahkamah oleh itu akan menyiratkan ini sebagai satu terma perjanjian (lihat ms 191G–I).

(3) Perbuatan plaintif dalam memberikan notis tiga bulan tersebut lebih awal adalah untuk meletakkan tekanan ke atas defendan. Ini dengan nyata adalah tidak berpatutan. Mahkamah oleh itu memutuskan bahawa notis tersebut sememangnya pra masa. Defendan juga tidak mengetepikan haknya untuk menimbulkan hujah ini dengan hanya berdiam diri dan menimbulkannya dalam pembelaannya. Tiada kewajipan sah di pihak defendan untuk memberikan respons. Pada hakikatnya tidak ada apa-apa yang boleh menghalang defendan daripada memohon untuk meminda untuk memasukkan pli pra masa notis ini, walaupun ia telah membuat peninggalan untuk berbuat demikian (lihat ms 192E–F.]

Notes

For cases on implied terms, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3964–4003.

Cases referred to

Ho Weng Leong v Ng Kee Chin [1996] 5 MLJ 139 (refd)
Mount Elizabeth Health Centre Pte Ltd v Mount Elizabeth Hospital Ltd [1993] 1 SLR 1021 (refd)
Yong Ong Kai v Enting [1965] 2 MLJ 98 (refd)

Legislation referred to

Evidence Act 1950 s 92

Douglas Yee (*Hanita Md Salleh* with him) (*KH Koh Azhar & Koh)* for the plaintiff.

JJ Naidu (*JJ Naidu & Rakan-Rakan*) for the defendant.

Kamalanathan Ratnam J:

Facts

By an agreement dated 7 April 1989 ('the agreement'), the defendant agreed to grant and the plaintiff agreed to take the exclusive right of displaying a neon sign advertisement unit on Hotel Mirama rooftop, Jalan Maharajalela, Kuala Lumpur. The neon sign in question was a display of the word 'DAIHATSU' and the agreement was for a period of three years commencing 1 March 1989 and terminating on 28 February 1992. It is necessary to reproduce certain relevant clauses in the agreement.

Clause 3 of the agreement provided as follows:

> The advertiser (plaintiff) shall have the option to renew three months before the expiry date, for a further term of two years at the rent based on the prevailing market rate or to a maximum increase of 20%, whichever is lesser; and upon the same terms and conditions in this agreement contained.

Clause 9 of the agreement provided as follows:

> The company (defendant) shall at all times ensure that the sky sign is lighted up and continues to be lighted up between the hours of 7pm to 12am each day during the continuance of this agreement. In the event of any power failure due to the sky sign itself, the company will undertake immediate remedial measures for the restoration of the power supply with the least possible delay.

By a letter from the plaintiff's solicitors to the defendant dated 5 September 1991, the plaintiff gave notice to the defendant that it wished to have the agreement renewed. The defendant, through its solicitors, wrote a letter to the plaintiff's solicitors dated 19 March 1992 informing the plaintiff that the defendant would not be able to renew the agreement because the owners and operators of Hotel Mirama had given the defendant three months' notice terminating the defendant's right to display the advertisement on the rooftop of Hotel Mirama.

Case for the plaintiff

The plaintiff's action is premised on two grounds, namely:

(a) that the defendant failed to comply with the plaintiff's notice to renew the agreement pursuant to cl 3 thereof; and

(b) that the defendant failed to ensure that the sky sign was lit up between the hours of 7pm to 12am each day during the continuance of the agreement in accordance with cl 9 thereof.

The plaintiff therefore prayed for:

(1) specific performance;

(2) damages in lieu of specific performance;

(3) liquidated damages amounting to RM38,997 for non compliance of cl 9; and

(4) costs.

At the commencement of the case before me, the defendant withdrew its counterclaim, which parties agreed was to be struck out with no order as to costs.

Findings of the court

Plaintiff's right to renew

It was the plaintiff's case that there were no limitations to its right to have the agreement renewed pursuant to cl 3, provided the renewal notice was given. Putting it in another way, so long as the plaintiff gave a proper notice of renewal under cl 3, the defendant had no right to refuse to renew, and if the defendant did so it would be in breach of the agreement. The plaintiff urged me to hold that the parties must intend what they have in fact said and that their words must be construed as they stood. It was the plaintiff's submission that cl 3 of the agreement clearly showed that the option given to the plaintiff was unilateral and unconditional. The defendant on the other hand had argued that the plaintiff's notice was premature. The agreement was to expire on 28 February 1992 and therefore any notice to renew ought to be given before 1 December 1991. The notice was dated 5 September 1991. The plaintiff argued that it had complied by giving the notice before 28 February 1992 whereas the defendant argued that the notice was given three months too early. The plaintiff also pointed out that this issue of the notice being premature was only raised by the defendant in its defence and that it had made no other protests. This conduct indicated that the defendant had accepted the notice as a valid notice and was therefore estopped from contending otherwise.

Previous agreements

Before I consider these arguments it is necessary to relate certain past events. On 20 September 1983, an agreement was signed between the plaintiff and Hakuhodo Malaysia Sdn Bhd, the then agent of the owners of Mirama Hotel, to rent the same space on the rooftop of the hotel to advertise the same neon sign unit. This agreement ('the first agreement') contained a very relevant cl 13 which reads as follows:

> 13 The agent shall have the right to determine and terminate this agreement by giving one month's notice to the advertiser in the event:
>
> (a) that the agent's rights to display the advertising sky sign on the said site being refused, prohibited, restricted or curtailed by any legislation, regulation, by laws, order or decision of any statutory planning or other authority or in the event of the occurrences of any state of war, civil disturbance or other state of emergency outside the control of the parties hereto;
>
> (b) the agent's agreement with the owner in connection with the site expiring or sooner determined.
>
> In the event of such an occasion arising, the agent shall refund to the advertiser the appropriate portion of the yearly rental for the period not utilized.

Subsequently, Hakuhodo Malaysia Sdn Bhd ceased to be the agent of Mirama Hotel and the plaintiff herein became the agent. The agreement dated 7 April 1989 was thus signed between the plaintiff and the defendant also for the display of the same neon sign unit on Hotel Mirama rooftop at the same site. Clause 3 contained the same renewal term, but the agreement also contained a cl 15 which reads:

> 15 The company warrants that it has the sole right to grant to the advertiser the right contained herein in relation to the display of the sky sign.

It is very relevant to note that in the agreement dated 7 April 1989 too this cl 13(a), as stated in the first agreement, had been included although it reads as cl 7. However, cl 13(b) of the first agreement has been significantly omitted in the present agreement between the plaintiff and defendant. What is most significant is that the said agreement dated 7 April 1989 was prepared by a firm of solicitors, namely, KH Koh, Cheong & Koh, who were then the solicitors for the plaintiff only. Indeed, it is the same firm of solicitors who now also in these proceedings, act for the plaintiff. Whilst both parties had signed the present agreement in question without the attestation of a solicitor, it is the contention of the defendant herein that the plaintiff knew all along that the said agreement was clearly subject to the existence of the agency agreement between the defendant and the owner, that is, Mirama Hotel. Whilst cl 13(a) of the first agreement has been included as cl 7 in the present agreement, cl 13(b) of the first agreement, the clause relating to the right of the agent, namely, the defendant, to terminate the existing agreement when its agency is terminated, has been significantly omitted.

Conduct of solicitors

The defendant now says that this significant omission was not explained to it by the plaintiff's solicitors. I find that the plaintiff cannot be unaware of this pertinent fact that this agreement was dependent upon the existence of the main agreement between the defendant and Hotel Mirama. Otherwise why did the plaintiff write a letter to the defendant dated 9 August 1991 seeking a meeting between the plaintiff, the defendant and the management of Hotel Mirama 'to settle this amicably'.

Implied term

To my mind this is a typical case where the court ought to consider the question of an implied term as was done by the court in *Yong Ong Kai v Enting* [1965] 2 MLJ 98. Whilst I agree that the courts ought not lightly imply a term into a contract, it is also the duty of the court to ensure justice is meted out and in order to do so, and if the circumstances thus warrant that a term be implied into the contract, the court must do so. It is clear to me that it must have been at the back of the minds of the parties that their present agreement would be of no significance without the existence of the main agreement between the defendant and Hotel Mirama. I would therefore imply this as a term of this agreement. As for the plaintiff's

submission that by implying a term, I would be contravening s 92 of the Evidence Act 1950 ('the Act'), I agree with the view expressed in *Ho Weng Leong v Ng Kee Chin* [1996] 5 MLJ 139 by Abdul Malik Ishak J that s 92 of the Act merely prescribes a rule of evidence and that it does not fetter the power of the court to arrive at the true meaning and effect of the tenancy agreement, by taking into account the surrounding facts and circumstances of the case.

Option

An option is a right given to a party to choose. In *Mount Elizabeth Health Centre Pte Ltd v Mount Elizabeth Hospital Ltd* [1993] 1 SLR 1021, GP Selvam JC expressed the view that the notice of a right to exercise an option should be given reasonably close to the last date on which it can be exercised. In that case the notice was given eight months ahead of the last date. He also expressed the view that unless waived by the defendants, the said notice was premature and ineffective. In the case before me, it is significant to note the date of the notice to exercise the option which was 5 September 1991, and this was whilst negotiations were still going on. I had in fact earlier referred to a letter dated 9 August 1991 from the plaintiff to the defendant urging negotiations. Was it therefore appropriate for the plaintiff to have exercised its right of option three months in advance of the expiry period? After all, there was nothing that the defendant could do until the last date of the period of expiry of the tenancy. So what was the hurry? To my mind, the conduct of the plaintiff in tendering the notice three months earlier was to put pressure upon the defendant. This is clearly unconscionable. I therefore rule that the notice was indeed premature. Did the defendant waive its right to raise this argument by merely keeping quiet and raising it in its defence? I do not think so. There is no legal duty on the part of the defendant to have responded. In fact there was nothing to have prevented the defendant from even applying to amend to include this plea of prematurity of the notice, even if it had omitted to do so in its defence.

Having considered all the evidence, and the submission of counsel, I dismiss this claim with costs.

Claim dismissed with costs.

Reported by Wong Ee Lynn